Southern California Pipe Trades District Council No. 16 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO *and* L & M Plumbing, Inc. and Berry Construction, Inc. Case 21–CD–579

February 28, 1991

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

The charge in this Section 10(k) proceeding was filed May 8, 1990, by Berry Construction, Inc. (Berry) and L & M Plumbing, Inc. (L & M), alleging that the Respondent, Southern California Pipe Trades District Council No. 16 of the United Association of Journeymen (Pipefitters), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Berry or L & M to assign work or continue the assignment of work to employees it represents rather than to employees represented by Southern California District Council of Laborers (Laborers). The hearing was held June 25, 1990, before Hearing Officer Steven G. Siebert.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Berry, a California corporation, is engaged in the construction industry as a general contractor. L & M, a California corporation, is engaged in the construction industry as a subcontractor of work involving plumbing and the placement of sewer, gas, and water lines at jobsites in Southern California. During the past 12-month period, a representative period, both Berry and L & M, individually, have purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of California. The parties stipulated, and we find, that Berry and L & M are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Pipefitters and Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In February 1990, L & M entered into a subcontract agreement with general contractor Berry to install storm drains and sewer, water, and gas lines at the A.B. Miller High School in Fontana, California, and the Kaiser Medical Office Building in Baldwin Park, California. L & M and the Pipefitters are signatory to a collective-bargaining agreement, the Southern California Pipe Trades Utility Agreement, pursuant to which L & M assigned the above work to employees represented by the Pipefitters. Berry has a collective-bargaining agreement with the Laborers, which also allegedly covers the same work.

In early February 1990, Laborers Representative Charles ''Frog'' Montgomery observed that the work in progress at the Baldwin Park site was being perfomed by L & M employees. Subsequent to this, Montgomery telephoned Tom Kern, consultant to L & M, and indicated to Kern that he was claiming the work for the employees represented by the Laborers and that he wanted L & M to become signatory to the Laborers agreement. Pursuant to this telephone conversation, a meeting between Montgomery, Kern, and Allen McGee, president of L & M, was held at the Fontana jobsite. At this meeting, Montgomery repeated his claim that L & M employees were performing laborers work and requested that McGee, on behalf of L & M, sign an agreement with the Laborers. McGee denied this request and informed Montgomery that L & M had an agreement with the Pipefitters, which covered the work. McGee also expressed his belief that the work in question had been properly assigned. Montgomery became angry at this response and threatened to ''do something with L & M and Berry'' and to cause ''lots of trouble.''

In early March, the Laborers filed grievances against Berry, claiming that Berry had violated the collective-bargaining agreement in effect between them, by subcontracting work to a nonunion company. These grievances are currently pending. Subsequent to the Laborers' filing of the grievances, the Pipefitters, by a letter dated May 4, 1990, wrote Berry, with a copy to L & M, threatening that if the work in dispute was reassigned to the employees represented by the Laborers, the Pipefitters would engage in a campaign to have it reversed, which might include picketing. Pursuant to this correspondence, Berry and L & M filed the instant unfair labor practice charge alleging that the Pipefitters had unlawfully threatened both Berry and L & M with an object of forcing Berry and L & M to assign or continue the assignment of certain work to the employees represented by the Pipefitters. A notice of a 10(k) hearing was issued on May 22, 1990.

On June 13, 1990, prior to the commencement of the hearing, the Laborers filed a motion to quash the 10(k) hearing. The Laborers claimed that because it did not have an agreement with L & M and because Berry did not have an agreement with the Pipefitters, its only claim was against Berry for allegedly violating the subcontracting clause of their collective-bargaining agreement. The Laborers further disclaimed any inter-

est in representing L & M employees or any interest in having L & M reassign the work to employees represented by the Laborers. On June 22, 1990, the Regional Director issued an order denying this motion. On June 25, 1990, the Laborers appeared at the hearing for the limited purpose of renewing its motion to quash the hearing and to reassert its disclaimers. The Laborers did not participate further in the proceedings.

B. *Work in Dispute*

The disputed work involves the installation of storm drainage systems, sewers, water lines, gas lines, and incidental work at the A.B. Miller High School project, Fontana, California, and the Kaiser Medical Office Building, 1011 Baldwin Avenue, Baldwin Park, California.

C. *Contentions of the Parties*

Berry and L & M contend that both Unions have claimed the work and have threatened Berry and L & M and engaged in coercive activity in pursuit of their respective work claims, and therefore that the Board should determine the merits of the dispute. Berry and L & M contend that the work in dispute should be awarded to employees represented by the Pipefitters based on L & M's collective-bargaining agreement with the Pipefitters covering the work in dispute, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operation.

The Laborers contends, inter alia, that no jurisdictional dispute exists where, as here, only one of the two unions has a contract with the employer that subcontracted the work and the other union alone has a contract with the subcontractor performing the work. Thus it contends that because it does not have a contract with L & M, and Berry does not have a contract with the Pipefitters, no jurisdictional dispute is properly before the Board. Further, the Laborers contends that its sole claim in this dispute is a contractual grievance against Berry for allegedly violating the agreement between them, by subcontracting work to employees not represented by the Laborers. Finally, the Laborers claims that any interest in either representing L & M employees or in having L & M reassign the work to Laborers-represented employees has been effectively disclaimed.

The Pipefitters contends that the dispute is properly before the Board and that both it and Laborers have claimed the work. Further, the Pipefitters contends that, applying the traditional tests, the work was properly assigned to employees represented by it.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

The Laborers, through its Representative Charles ''Frog'' Montgomery, informed L & M by telephone and then at a jobsite meeting that it claimed the work for the employees represented by the Laborers and that it wanted L & M to sign an agreement with it. When L & M refused this request, Montgomery made threatening statements to ''do something'' to both Berry and L & M and to cause ''lots of trouble.'' Subsequent to this, the Laborers filed a grievance against Berry for allegedly violating the agreement between them by subcontracting work to employees not represented by the Laborers. This grievance was, in effect, a demand for work.[1] Accordingly, we find that Montgomery's statements and threats to L & M, as well as the Laborers' filing of the grievance, constitute a demand for the work.[2]

Subsequent to the filing of the grievance, but prior to the 10(k) hearing in the present case, the Laborers made an attempt to disclaim interest in the dispute. In a letter sent to the Regional Director, the Laborers disclaimed an interest in representing the employees of L & M or an interest in having L & M reassign the work to employees represented by the Laborers. The Laborers, however, continued to pursue its grievance against Berry. We find that the continuance of the grievance is inconsistent with any assertion of a disclaimed interest in the work.[3] We thus find that the Laborers' attempted disclaimer is not a true renunciation of interest in the work and, hence, is ineffective.

Further, in a letter dated May 4, 1990, the Pipefitters notified both Berry and L & M that if the work in dispute was reassigned to the employees represented by the Laborers, the Pipefitters would engage in a campaign to reverse the reassignment that might include picketing. It is well established that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred if a labor organization that represents employees who are assigned the disputed work threatens

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[1] *Plumbers Local 612 (Mechanical, Inc.)*, 298 NLRB 793 (1990); *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990); *Laborers (O'Connell's Sons)*, 288 NLRB 53 (1988); *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200 (1985).

[2] We find no merit to the Laborers' contention that this dispute is not properly before us because the two Unions have contracts with different employers. The applicability of Sec. 8(b)(4)(D) is not limited to competing groups of employees working for the same employer but also extends to attempt to force an indirect assignment of work from employees of one employer to employees of another. *Teamsters Local 222 (Emery Mining)*, 262 NLRB 1064, 1067 (1982).

Further, there is no record evidence to establish that employees represented by the Laborers had historically performed for Berry the same type of work that is in dispute. Cf. *Electrical Workers IBEW Local 103 (T Equipment Corp.)*, 298 NLRB 937, 939 (1990).

[3] *Carpenters Ventura County District Council (C & W Fence)*, 296 NLRB 1091 (1989); *Ironworkers Local 197 (Del Guidice Enterprises)*, 291 NLRB 1 (1988); *Laborers (O'Connell's Son's)*, supra at 54 fn. 2; *Sheet Metal Workers Local 107 (Lathrop Co.)*, supra at 1202 (1985).

to picket or otherwise coerces an employer to continue such an assignment.[4]

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment, based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.[5]

1. Collective-bargaining agreements

L & M and the Pipefitters are currently bound by a collective-bargaining agreement (Southern California Pipe Trades Independent Utility Agreement) which covers the work in dispute. L & M, the employer that controls the assignment of the disputed work, is not signatory to any collective-bargaining agreement with the Laborers. We find that this factor favors an award of the disputed work to the employees represented by the Pipefitters.

2. Employer preference and past practice

L & M has assigned the disputed work to the employees represented by the Pipefitters, and L & M has stated its preference to use these employees rather than those represented by the Laborers. L & M further stated that, in the past, it has consistently assigned this type of work to employees represented by the Pipefitters. This factor, therefore, also favors an award of the disputed work to the employees represented by the Pipefitters.

3. Industry practice

The record evidence indicates that it is industry practice to employ employees represented by the Pipefitters to perform work similar to that in dispute. The Laborers presented no evidence to show that employees it represents have performed the same or similar work in the past. Accordingly, this factor favors an award to the employees represented by the Pipefitters.

4. Relative skills

Evidence was presented at the hearing by Berry, L & M, and the Pipefitters regarding the skills needed to perform the disputed work. L & M trains its Pipefitters-represented employees to perform the work at its jobsites, although no special education is required. These employees also possess special skills to follow written instructions regarding the placement of water and sewer lines so that the water flows properly through the pipes. The Laborers presented no evidence as to whether employees it represents were qualified to perform the disputed work. Therefore, this factor also favors assigning the disputed work to employees represented by the Pipefitters.

5. Economy and efficiency of operation

In light of the special skills needed to perform the work in dispute and the possession of those skills by the employees represented by the Pipefitters, the Employer contends that it is more economical and efficient to use the employees represented by the Pipefitters. The Laborers presented no evidence on this subject. Accordingly, this factor also favors an award to the employees represented by the Pipefitters.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Pipefitters are entitled to perform the work in dispute. We reach this conclusion relying on the factors of the collective-bargaining agreement, the Employer's preference and past practice, industry practice, relative skills, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by the Pipefitters, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of L & M Plumbing, Inc., represented by Southern California Pipe Trades District Council No. 16 of the United Association of Journeymen are entitled to perform the installation of storm drainage systems, sewers, water lines, gas lines, and incidental work at A.B. Miller High School project, Fontana, California, and Kaiser Medical Office Building, 1011 Baldwin Avenue, Baldwin Park, California.

CHAIRMAN STEPHENS, concurring.

I agree with my colleagues that this dispute is properly before the Board, but for reasons different from theirs. In my dissent in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), I stated that I would not find a competing claim for work in the lim-

[4] See fn. 1.

[5] The Laborers offered no evidence or testimony at the hearing regarding these factors on the merits, nor did it make any arguments on the merits in its brief to the Board.

ited situation in which a union files an arguably meritorious grievance for the breach of a union signatory subcontracting clause, and in which the work was assigned by the subcontractor who was a beneficiary of the arguable breach, to employees of the union engaging in threats or coercion. In so stating, however, I made it clear that my position was limited to cases in which the only action taken by the grieving union was to announce its intent to pursue its grievance against the employer and then to actually pursue it through lawful channels. In this case, the Laborers did much more than simply announce and pursue its grievance against Berry. Specifically, Laborers Representative Montgomery not only claimed the work, but also issued threats of reprisal against both Berry and L & M stating that he would cause ''lots of trouble.'' Thus this case does not present a situation comparable to that in *Slattery*, in which the one union claimed but did not make a demand for the work, and thereafter merely announced and filed an arguably meritorious grievance against the general contractor that had subcontracted the work. Rather, this case also includes conduct by the Laborers that would be proscribed by Section 8(b)(4)(D) of the Act.[1]

I also agree with my colleagues that the Laborers' disclaimer is invalid, but do so based solely on my finding that the disclaiming statements do not expressly renounce an interest in the disputed work. A careful reading of the Laborers' disclaimer reveals that it disclaims only (1) any interest in representing L & M employees, and (2) any interest in L & M's reassigning the work to employees represented by the Laborers. Thus, the Laborers makes no explicit statement entirely renouncing the work itself. I find that fact alone enough to invalidate any attempted disclaimer, so long as L & M's employees continue to perform the work.

[1] I recognize that no charge has been filed against the Laborers and, therefore, that no finding of reasonable cause to believe that Sec. 8(b)(4)(D) has been violated can be made on the basis of Montgomery's threat. With respect to Montgomery's conduct in this regard, however, the issue is not whether reasonable cause exists by virtue of such conduct—that has been established by the charged party's conduct; the issue, instead, is whether that conduct was in furtherance of the Laborers' claim to the work for the employees it represents and thus went beyond its resort to the grievance/arbitration procedures in the Laborers' contract with Berry. Accordingly, I find that there are competing claims for the disputed work and that a jurisdictional dispute exists within the meaning of the Act.